IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 126

WILLIAM MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

De Long Harris
Counsel for Petitioner
1901 Eleventh Street, N.W.
Washington 1, D. C.

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Opinions Below

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the District of Columbia Circuit was by a divided Court. Danaher, *C.J.* wrote the prevailing opinion in which

Miller, *C.J.* concurred (R. 238). Edgerton, *Ch.J.* wrote the dissenting opinion (R. 251). These opinions are reported at 244 F.2d 750 and are also printed at pages 238 to 253 of the printed record herein.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered October 18, 1956 (R. 254). The petition for rehearing *in banc* was denied by the Court of Appeals by order entered December 3, 1946 (R. 255). The petition for writ of certiorari was filed within thirty days thereafter and was granted May 13, 1957; 1 L.Ed. 2d 908 (R. 255).

Jurisdiction of this Court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, Section 1254 United States Code.

Constitutional Provision Involved

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes Involved

Title 18, Section 3109 United States Code provides:

> Breaking Doors or Windows For Entry Or Exit.
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after

notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (June 25, 1948, ch. 645, par. 1, 62 Stat. 820.)

Title 18, United States Code, Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 26, United States Code, Section 4704a (formerly Section 2553) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and in the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 21, United States Code, Section 174, in pertinent part, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law; or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts

in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. * * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Questions Presented

I.

Where agents and officers not responding to an emergency, without a warrant of any sort and without notice of their purpose, break the door of a suspected felon to search his premises for evidence (marked money) and to arrest him, is evidence seized as a result admissible in a federal criminal trial?

II.

Must requirement of 18 U.S.C. 3109 that an officer seeking entry to premises to execute a search warrant must give notice of his purpose before breaking a door to gain entry, be also observed by an officer seeking admittance to premises without a warrant to search for evidence and to arrest a suspected felon?

Statement

Petitioner was tried in the District Court along with co-defendants Arthur Roy Shepherd and Bessie Byrd upon a seven count indictment filed June 1, 1955 (R. 35). Petitioner was convicted upon counts one, two and three of the indictment. Count one charged petitioner, Shepherd and Byrd with conspiracy to violate the narcotic laws (18 U.S.C. 371). Count two charged petitioner and Byrd with having purchased, sold and distributed, not in the original stamped package, 100 capsules of a mixture containing heroin, a narcotic drug, in violation of 26 U.S.C. 4704(a). Count three charged petitioner and Byrd with having facilitated the concealment and sale of the 100 capsules of heroin mixture charged in count two, in violation of 21 U.S.C. 174. Petitioner and Byrd were also charged in counts six and seven of the indictment with regard to 381 capsules of a heroin mixture. Count six charged petitioner and Byrd with having purchased, sold and distributed the said capsules of heroin mixture in violation of 26 U.S.C. 4704(a). Count seven charged petitioner and Byrd with having facilitated the concealment and sale of the same 381 capsules of heroin mixture charged in count six in violation of 21 U.S.C. 174. The District Court dismissed counts six and seven of the indictment (R. 198).

On June 29, 1955 petitioner received consecutive sentences under the three counts of the indictment of which he had been convicted totaling six years to twenty years imprisonment as follows: count one—one year to four years; count two—thirty months to eight years; count three—thirty months to eight years; all sentences to run consecutively (R. 233).

Before indictment, petitioner and Bessie Byrd filed a motion to suppress as evidence, certain "marked" money

seized from their persons and from their premises, upon grounds, *inter alia*, (1) their arrest was illegal, (2) their premises were forcibly broken into and entered, (3) the search of their premises was exploratory, all in violation of Amendment IV. Attached to the motion to suppress was the joint affidavit of petitioner and Bessie Byrd which, in pertinent part, averred:

> "That about four (4) o'clock A.M. on the morning of March 25, 1955, they were awakened in their apartment, located at Columbia Road, N.W., Washington, D. C., by the noise created by someone breaking in a doorway in the hallway, leading to their apartment (only), and that upon his cracking his door (with a chain thereon), to ascertain the origin of said noise, that officers Wilson, Pappas and four others did break the chain off of the door, and forcibly enter his apartment" (R. 2).

The motion to suppress was denied (R. 34). During the trial the motion was renewed several times and denied (R. 51; 130; 182; 194).

Evidence Pertinent to Motion to Suppress Both Upon the Motion and During Trial

At about 1:35 A.M., March 25, 1955, Federal Bureau of Narcotics Agent Fred E. Wilson arrested one, Clifford Reed under an arrest warrant charging Reed with violations of the narcotics laws on January 20, 1955 (R. 73; 118). Agent Wilson knew Reed to be a narcotic addict (R. 119; 138). Reed told Agent Wilson that in the past he had purchased heroin from the defendant Shepherd in 100 capsule lots for $100.00; that he met Shepherd in the early morning hours, gave him the money and either waited at the home of Shepherd until Shepherd returned with the

heroin or, on occasion would go with Shepherd to 1337 Columbia Road, N.W., where Shepherd would get out of the cab, go into the basement Apartment marked No. 1, and purchase heroin from petitioner, come back to the cab and give him the heroin (R. 9; 10). Reed told Agent Wilson that Blue Miller and Bessie Byrd resided in Apartment No. 1, 1337 Columbia Road, N.W. There was no testimony that Reed ever actually saw Miller or Byrd, that he knew either, or that he ever witnessed any transaction between Shepherd and Miller or Byrd. Officer Wurms said that he knew petitioner from a prior narcotics investigation but on cross examination he admitted that he had seen petitioner and Byrd but had never talked to either (R. 29).

Because the narcotic addict Clifford Reed told Agent Wilson that he could cause or effect a purchase of narcotics from the defendant Shepherd, Reed was not immediately "booked" or charged (R. 121).

Agent Wilson, having received this information, decided against obtaining warrants for the arrest of petitioner and Bessie Byrd and decided against obtaining a warrant for the search of their premises. Instead, Agent Wilson set out to employ the willing narcotic offender, Clifford Reed as an informer for the purpose of testing the reliability of Reed's information, or, to use Reed to contact the defendant Arthur Roy Shepherd and thereby possibly being led to the source of Shepherd's supply. Agent Wilson then made arrangements to meet D. C. Police Officer Wurms, Bureau of Narcotics employee Lewis, Agent Pappas, and Virginia State Police Officers Bowman and Thompson at the corner of 6th Street and New York Avenue, N.W., in the District for the purpose of assisting him in his plan. Agent Wilson then took the narcotic offender Reed from the Police Headquarters where he had been temporarily detained without being booked or charged as a result of his arrest under

the warrant (R. 119; 156), to the corner of 7th and T Streets, N.W., where they met by pre-arrangement, Agent Pappas, and Officer Bowman, of the Virginia State Police at about 2:30 A.M. (R. 63; 81). The officers and agents with Reed in custody then proceeded in one car to the corner of 6th Street and New York Avenue, N.W. (R. 63; 81). Present also was D. C. Police Officer Ivan Wurms.

On that corner Agent Wilson recorded the serial numbers of $100.00 in bills[1] (R. 11; 82). The "marked" $100.00 in bills was given to Bureau of Narcotics employee Arthur Lewis. It was planned that Reed would act in conjunction with Lewis at the direction of Agent Wilson (R. 120). Agent Wilson instructed employee Lewis to "*put the money on the proposed defendant,*" Arthur Roy Shepherd (R. 121). It was understood that the arrested narcotic offender Clifford Reed was to act with Lewis in an effort to purchase narcotics from Shepherd. It was agreed that if Lewis had given the "marked" money to Shepherd, Lewis was to walk directly into the 1330 Vermont Avenue house upon arrival there (R. 15; 85).

Lewis and, the now informer, Reed entered a taxicab and proceeded to 617 M Street, N.W., where employee Lewis gave informer Reed $50.00 of the "marked" money to attempt to purchase narcotics from Shepherd (R. 64). Reed went into 617 M Street, N.W., and returned with defendant Shepherd. Reed then returned the "marked" $50.00 to Lewis (R. 65). Lewis then gave to Shepherd $100.00 of the "marked" money (R. 69). The cab proceeded to Reed's home at 1330 Vermont Avenue, N.W., where Lewis and Reed got out of the cab (R. 13; 75). At all times the taxi containing Reed and Lewis, and later Shepherd,

[1] This $100.00 in bills, the serial numbers of which were recorded is referred to as the "marked money" throughout the testimony.

was being followed by two cars, one containing Agent Wilson, D. C. Officer Wurms, and Virginia Officer Bowman, and a second car containing Agent Pappas and Virginia Officer Thompson; the two cars were in contact with each other by radio (R. 13; 84).

Shepherd remained in the taxi; the taxi proceeded to the 1300 block of Columbia Road, N.W., where it stopped, double-parked. Shepherd got out of the cab and entered the basement of 1337 Columbia Road, an Apartment building (R. 13).

Agent Wilson got out of his car, waited about a minute, and then entered the basement entrance to 1337 Columbia Road, N.W.; he looked but saw no one in the hallway (R. 13; 88). The hallway had three doors, the outside entrance door, one to the furnace room and one leading to the back Apartment (R. 14; 98). Wilson left the basement of the building, took a position across the street where he observed a light go on in the front *furnace room*; the light stayed on a short time. It is to be noted that he did not see a light in Apartment 1. Wilson testified that he was not certain that Shepherd had contacted either petitioner or Bessie Byrd until after the Apartment had been searched (R. 21). A few minutes later Shepherd came out of the house and got back into the taxicab (R. 14). Agent Wilson then got into a car driven by Agent Pappas. There was conversation by radio between Wilson and Officer Wurms, who was driving the second car (R. 91). Both cars followed the taxi in which Shepherd rode for a few blocks to the corner of 13th and Fairmont Streets, where Wurms pulled in front of the taxi and stopped it (R. 14; 19). Wurms testified that he stopped the cab because he wanted to arrest Shepherd (R. 153). Wilson testified that when the cab was stopped he saw Shepherd lean forward and place something under the front seat of the cab (R. 14; 92). Agent Wilson imme-

diately arrested Shepherd and took him from the cab although at that time, Wilson testified, he had no evidence of any violation of the law (R. 124; 140-141; 155). After the arrest of Shepherd the cab was searched and an envelope containing 100 capsules of a suspected narcotic was found under the front seat of the cab (R. 92). Wilson questioned Shepherd about the package found in the cab. Shepherd said that he had been to 1337 Columbia Road, that he had not gone there to see anyone in particular and that Reed and Lewis had told him to go to that address and look behind a fire extinguisher in the hallway where he would find 100 capsules of heroin in a package (R. 16; 94). Shepherd was searched by Wilson, who said, "I was looking for my marked money" (R. 94). Shepherd did not have the marked money.

The officers and agents then returned to 1337 Columbia Road, N.W. Some officers went immediately to the basement furnace room and, presumably, began a search (R. 123). Officer Wurms entered the building by the first floor entrance upstairs. In order to enter the Apartment of petitioner from the first floor, it was necessary to enter a door leading to the basement at the bottom of the stair case. THIS DOOR WAS LOCKED. *Officer Wurms entered this door by using a skeleton key* (R. 29). Having entered the basement hallway by breaking the door in the aforesaid manner, Officer Wurms proceeded to the door leading to Apartment 1, where he was met by Agent Wilson. Agent Wilson had entered the building by way of the basement and proceeded to the door of Apartment 1; he testified: "I put my ear to the door and was listening to see if I could hear anybody moving around inside, and Officer Wurms joined me at the door, and he knocked on the door and in a very low voice he said, 'Blue, police, open the door,' and somebody from within the room says,

'Who's there?', and he says, 'Blue, open the door, police,' AND HE WAS SAYING IT VERY QUIETLY" (R. 99). Wilson said that he heard no signs of life or of anybody in the Apartment (R. 133). Wilson testified:

> Q. Will you tell us what happened when you went down into the premises there?
>
> A. Officer Wurms knocked on the door and a voice from inside asked, "Who is there?" Officer Wurms repeated the name, "Blue", called Blue. Then he said in a very low voice, "Police". The door was opened slightly, and IT HAD A CHAIN ON IT, and as the door was opened and the man looked around the door, HE TRIED TO CLOSE THE DOOR.
>
> * * * * * * *
>
> Q. Did he say anything when he opened the door?
>
> A. Yes, sir, he didn't want to let us in.
>
> Q. What were his words?
>
> A. I can't recall, but HE WANTED TO KNOW WHAT WE WERE DOING THERE.
>
> * * * * * * *
>
> Q. What happened with respect to the door at that point?
>
> A. WE FORCED THE DOOR OPEN AND FORCED OUR WAY INTO THE ROOM.
>
> Q. Was the door itself broken?
>
> A. No, sir.
>
> Q. What was broken, if anything?
>
> A. I believe THE CHAIN LATCH ON THE DOOR WAS BROKEN (R. 16-17).

Wilson said that he did not know why Wurms spoke in a *very low voice* at the door (R. 133). As to whether or not the agent or officer ever announced to petitioner their PURPOSE in entering the Apartment, Wilson testified:

The Witness: Officer Wurms knocked on the door, he says, "Blue, open the door, police," there was a voice inside that said, "Who's there?", and Wurms again knocked on the door and says, "Blue, open the door, police."

Q. That was everything Officer Wurms or yourself said?

A. Until the door was opened, yes (R. 134).

Petitioner was never told the purpose of the entry into his Apartment. Wilson testified that their purpose of *looking for marked money* was not disclosed until *after* the forced entry had been effected:

Q. Did you or Officer Wurms ever tell Mr. Miller why you wanted to come into his Apartment?

A. I believe after we were in there we told him that WE WANTED TO LOOK FOR THE MONEY.

Q. After you were in?

A. Yes, sir (R. 134).

Officer Wurms testified concerning the breaking and entry into petitioner's Apartment: ". . . There was a chain on the door. Blue Miller saw me, Agent Wilson, and I don't know who else he saw but he tried to close the door and at that time we put our hands inside the door and PULLED AND RIPPED THE CHAIN OFF AND ENTERED" (R. 157).

Wurms also testified:

Q. Now, Officer Wurms, at the time you entered Apartment 1, the door was locked wasn't it? There was a chain on the door, was there not?

A. There was a chain on the door, yes, sir.

Q. And that chain was broken off, wasn't it?

A. Yes, sir (R. 31).

As soon as the forced entry was effected, Agent Wilson testified, "I told him to sit down and said they were under arrest and, WE WERE LOOKING FOR OUR MARKED MONEY" (R. 19). Wilson testified also, "WE BEGAN AN IMMEDIATE SEARCH OF THE ROOM FOR THE MONEY" (R. 100). The primary purpose of the agents and officers in forcing an entry into the Apartment was not to arrest petitioner or Byrd but to search for the "marked" money. Wurms took from co-defendant Bessie Byrd a roll of money and gave it to Agent Wilson (R. 17; 137). Wilson began checking the serial numbers and uncovered $34.00 of the "marked" money (R. 17). An hour or so later Officer Wurms found $66.00 of the marked money, some in a hat box and the remainder between the sheets of the bed in the Apartment (R. 101). No narcotics were found in the Apartment. Some two hours later 381 capsules of a heroin mixture were found in the furnace room (R. 101). The trial court granted the motion to dismiss as to counts 6 and 7 of the indictment pertaining to the 381 capsules found in the furnace room (R. 198).

The use of the "marked" money as evidence resulted in petitioner's conviction as aforesaid.

Summary of Argument

I.

The facts and circumstances within the knowledge of Agent Wilson and Officer Wurms at the time of the breaking into of petitioner's apartment did not constitute probable cause to believe petitioner had committed a felony. But assuming, *arguendo*, that the Agent and Officer did in fact have probable cause to arrest petitioner without a warrant, petitioner's arrest was illegal and the evidence secured as a result should have been excluded under Amendment IV, of the Constitution because:

(1) The initial entry by Officer Wurms into the basement hallway was accomplished by a felonious breaking in the use of a skeleton key such that the felonious character of his initial entry, "followed every step of his journey inside the house and tainted its fruits with illegality." *McDonald* v. *United States,* 335 U.S. 451, 459; 93 L.Ed. 153, 160;

(2) The breaking of the chain latch on petitioner's apartment door and entry therein by force without notice of purpose by Wurms or Agent Wilson, although petitioner made inquiry of them, was an illegal entry under the rationale of 18 U.S.C. 3109 which provides that officers must give notice of their purpose before breaking a door to execute a search warrant. Officers have no greater rights in entering a dwelling at night to effect an arrest without a warrant than they have in executing a search warrant. Moreover, in the absence of Federal legislation providing for the manner and method of entering a dwelling to arrest a suspect without a warrant, an arrest depends for its validity upon local or state law. *United States* v. *Di Re,* 332 U.S. 581, 589; 92 L.Ed. 210, 217. In the District of Columbia, local law on the subject is expressly set forth in *Accarino* v. *United States,* 85 U.S. App. D.C. 394; 179 F.2d 456 which holds that before an officer may break a door to arrest he must give due notice of his purpose. The United States Court of Appeals for the District of Columbia Circuit in several cases has held that an entry to effect an arrest, with or without a warrant, without having first given notice of purpose is an illegal entry, such an arrest unlawful and evidence secured as a result inadmissible.

II.

Petitioner's arrest was merely incidental to the principal purpose of Agent Wilson and Officer Wurms of searching

for and seizing the "marked money" that had been passed to Shepherd. The Agent and Officer hoped to find the marked money in petitioner's apartment. If the marked money could be found in petitioner's apartment, then petitioner could be connected with the narcotics seized from Shepherd. The arrest was, therefore; a mere pretext for the search.

This Court has consistently pointed out that what constitutes a reasonable search of an automobile or semi-public place would not constitute a reasonable search of a private home. The search of petitioner's home without a warrant is not the type of search approved in *United States* v. *Rabinowitz*, 339 U.S. 56; 94 L.Ed. 653 because here the search and seizure were not incident to a valid arrest and the place broken into and searched was a private dwelling and not a business room open to the public. The absence of a warrant, therefore, becomes a circumstance to be considered, along with the two unlawful breakings, in determining whether or not the search was a reasonable one under Amendment IV.

ARGUMENT

I.

When Officers Break a Door to Arrest a Suspected Felon Without a Warrant and Without Notice of Purpose, Evidence Seized as a Result Is Inadmissible Under Amendment IV. And Under the Rationale of 18 U.S.C. 3109.

During nighttime hours March 25, 1955, District of Columbia police officer, Wurms and Federal Bureau of Narcotics Agent Wilson, without a warrant of any sort and without first giving notice of their purpose, broke into

and forced their way into petitioner's dwelling. Petitioner occupied an apartment in the basement of an apartment building. Wurms entered the apartment building by the first floor and broke into a door leading from the first floor to the basement hallway by using a skeleton key to unlock a locked door. Wilson entered the building by the basement entrance and placed his ear against the door of petitioner's apartment and heard no indication of anyone moving around in the apartment. Wilson was joined at that door by Wurms who had broken into the basement hallway as aforesaid. Thereupon Wurms said in a *"very low voice"*, *"very quietly"*, "Police, open the door". Petitioner partially opened the door, which continued to be secured by a chain and asked, "what you all want?". *There was never an answer to his question.* If by chance the Agent and Officer had forgotten to announce their purpose in seeking entry into petitioner's home, they were thus given an opportunity to state their purpose. This they failed to do. Petitioner then attempted to close the door which was still secured by the chain latch. Without saying anything more, Wurms broke the chain securing the door and Wurms and Wilson forced their way into petitioner's apartment. When inside the apartment, Agent Wilson told petitioner to sit down and that they were under arrest and that, *"We Were Looking for Our Marked Money"* (R. 19). Wilson said that, *"We Began An Immediate Search of the Room for the Money"* (R. 100). Petitioner's apartment was occupied by himself and co-defendant Bessie Byrd. From Byrd's housecoat pocket part of the marked money was taken, and the rest was found in the bed and in a hat box in the apartment.

The Government claims that the purpose of the breaking and entry into petitioner's apartment was to arrest petitioner and Bessie Byrd upon probable cause to suspect that

they had committed the felony of selling narcotics to their co-defendant Shepherd. Petitioner urges that the chief purpose of the breaking and entry both into the hallway and into his apartment was not to arrest him but to search for and seize certain "marked money" that the Agent and Officer expected to find in his apartment. The conviction of petitioner upon all of the 3 counts of the indictment of which he was found guilty by a jury is dependent upon the validity of the seizure of the said "marked money" found in his apartment.

The breaking and entry into the hallway and the breaking and entry into petitioner's apartment without notice of the purpose of the Agent and Officer rendered the arrest of petitioner and his co-defendant Byrd and the subsequent search for and seizure of the "marked money" illegal and in violation of the rights secured to petitioner under Amendment IV of the Constitution. Upon this main proposition this brief is written. However, there is a serious question as to whether or not the Agent and Officer had probable cause to believe that either petitioner or Byrd had committed a felony at the time they broke into and entered petitioner's apartment. At the time of entry the facts known to the Agent and Officer did not constitute probable cause. They had knowledge of these facts:

About 1:35 a.m., March 25, 1955, Agent Wilson arrested a known narcotic offender and narcotic addict, Clifford Reed on a warrant charging a narcotic violation, January 20, 1955. Reed was not immediately "booked" or charged but was taken to Police Headquarters. Reed told Wilson that he had in the past purchased heroin in 100 capsule lots from one, Arthur Roy Shepherd; that he met Shepherd in the early morning hours, gave him the money and waited at Shepherd's home until Shepherd returned with the heroin or, on occasion, would go in a taxi with Shepherd

to 1337 Columbia Road, and wait in the taxi while Shepherd went into Apartment No. 1, where "Blue" Miller and Bessie Byrd resided and that Shepherd would return with the heroin. Reed did not say that he knew either Miller or Byrd or that he ever witnessed any transaction between Shepherd and Miller or Byrd.

It was agreed that Reed would work with the Agent in attempting to purchase narcotics from Shepherd. Apparently Wilson believed that he could use Reed for this purpose and that he might also be led to the source of Shepherd's supply. There was nothing in the evidence to suggest that this plan could not have been carried out on the next, or any other subsequent night, or, that it was not feasible to get warrants for the arrests of Shepherd, Byrd, and petitioner or a search warrant for the premises of petitioner. According to a pre-arranged plan, a Bureau of Narcotics employee, Lewis, who was being trained as an Agent, was given $100.00 in bills, the serial numbers of which had been recorded. He was directed to, "put the money on the proposed defendant Shepherd," and he left in the company of, the now informer, Reed in a taxi. It was planned that if employee Lewis went into the home of Shepherd at 1330 Vermont Avenue, it would indicate that the marked money had been passed to Shepherd. Agent Wilson, Officer Wurms, and other officers followed the taxicab in two automobiles and kept the taxi under observation. Wilson and Wurms observed Reed get out of the taxi at 617 M Street and return with Shepherd. The taxi proceeded to 1330 Vermont Avenue where Reed and Lewis got out of the cab. Shepherd remained in the cab. The cab then proceeded to the 1300 block of Columbia Rd., and double-parked. Shepherd went into 1337 Columbia Rd., by the basement entrance. Officer Wilson entered the base-

ment, looked into the hallway and saw no one. Wilson then went across the street where he observed a light go on in the front furnace room of the basement. He saw no light in petitioner's apartment. A few minutes later Shepherd re-entered the taxi. The taxi was followed several blocks and was stopped by Officer Wurms. Shepherd was immediately arrested; he had been seen to lean forward and place something under the seat of the cab. The cab was searched and an envelope containing 100 capsules of a heroin mixture was found under the seat. After denying that the package was his, Shepherd said that he had been to 1337 Columbia Rd., that he had gone there at the direction of Reed and Lewis who told him he would find a package with 100 capsules of heroin behind a fire-extinguisher. Wilson and Wurms had information that petitioner Miller and Bessie Byrd had in the past violated the narcotic laws. Shepherd was searched and the marked money was not found. The officers and agents then proceeded to 1337 Columbia Rd., an apartment building. Officer Wurms entered the building by the first floor; when he found the door leading from the first floor to the basement locked, he broke and entered the same by using a skeleton key and joined Wilson in the basement. Meanwhile, Agent Wilson had placed his ear to the door of Apartment No. 1, and had heard no one moving around inside. It was then that Officer Wurms, "*very quietly*" and in a "*low tone of voice*" said, "Blue, Police, open the door." Petitioner then partially opened the door which was secured by a chain latch and inquired who was there. Petitioner then attempted to close the door. Without any announcement of purpose and without saying anything further the chain latch on the door was broken and Wurms and Wilson forced their way into the apartment. Inside the apartment Miller and Byrd were told that they were under arrest and that the agent and officer were *looking for their marked money.*

There was under the circumstances no probable cause in the minds of Wilson and Wurms to believe that petitioner and Byrd had sold or transferred the narcotics to Shepherd and there was then no reason to arrest petitioner or Byrd. There was no suggestion in the evidence that Miller or Byrd might flee or that it was not reasonable under the circumstances to procure warrants for the arrest of Byrd and petitioner and a warrant for the search of their premises. It is also highly significant to note that Agent Wilson testified that he was not certain that Shepherd had contacted Miller or Byrd until *after* the search of the apartment.

This argument, however, is written upon the assumption, *arguendo*, that the officers and agents did in fact have probable cause for the arrest of petitioner. Petitioner's arrest was illegal because the door leading to the basement hallway was broken by use of a skeleton key and the door to his apartment was broken without any announcement as to why the officers and agents sought to enter this home at that hour of the night.

Congress has enacted no legislation defining the circumstances under which an agent or officer may break down the door of a private dwelling during the nighttime to arrest a suspected felon without a warrant. Congress has prescribed conditions under which an officer may break a door to execute a search warrant. This prescription was originally contained in the "Espionage Act", 40 Stat. 229, Chap. 30, Title XI; approved July 15, 1917. Title XI of the original Bill (H.R. 291, 65th Congress, 1st Session) had to do with search warrants and was entirely re-written in Conference between the House and Senate. This title was based almost wholly upon the New York Law on the sub-

ject.[2] Sections 8 and 9 of the original Title XI became sections 618 and 619 of Title 18 United States Code (1940 ed.), said sections 618 and 619 were consolidated with minor changes of phraseology but without change of substance[3] and now comprise Section 3109 of Title 18 of the 1952 Edition of the United States Code.[4]

18 U.S.C. 3109 provides:

> Section 3109. Breaking doors or windows for entry or exit.
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (June 25, 1948, ch. 645, par. 1, 62 Stat. 820.)

18 U.S.C. 3109 is based upon New York Code of Criminal Procedure Section 799 which provides:

> "The officer may break open an outer or inner door or window of a building or any part of the building, or anything therein, to execute the warrant, if after notice of his authority and purpose, he is refused admittance."

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[2] "Title XI—Search Warrants

This title was entirely re-written in conference. The new title as presented by the conferees was based upon the New York Law on the subject and it follows generally the policy of that law. It has written into it many of the provisions of the title as passed by the House." Conference Report No. 69, Congressional Record 65th Cong. 1st Session page 3305; U.S. House Reports Vol. 1, Serial No. 7252; Senate Documents, Vol. 10, Serial No. 7264.

[3] United States Code, 1952 Edition page 2492, Reviser's note.

[4] Act of June 25, 1948, ch. 645, par. 1; 62 Stat. 819.

Concerning this section of the New York Code a compiler's note in Vol. 66(2) McKinney's Consolidated Laws of New York Annotated at page 694 states:

> "By the express provisions of this section, the officer may not break into a place under a search warrant, unless, after due notice of his authority and purpose, he is refused admittance, and his doing so otherwise is a criminal offense by the express provisions of Penal Code Section 120 now Penal Law Section 1847. Phelps v. McAdoo, 1905, 47 Misc. 524; 94 N.Y.S. 265, 19 N.Y. Cr. R. 126, 10 N.Y. Ann. Cas. 470."

The New York Code provides for the manner of entering a building for the purpose of making an arrest without a warrant. New York Code of Criminal Procedure, Section 177 provides as follows:

> "To make an arrest as provided in the last section[5] the officer may break open an outer or inner door or window of a building if, after notice of his office and purpose, he is refused admittance."

It is of interest to note that the New York statutes require the officer to give notice of his purpose before breaking a door when executing a search warrant as well as when making an arrest without a warrant.

Can it be that Congress intended that the citizen whose home is sought to be invaded for purposes of an arrest without a warrant is not entitled to be notified of the purpose of the officers seeking entry before such officers are authorized to break in the door to his dwelling and the citizen would be entitled to such notice only if the officers had

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[5] The last section, 177, sets forth when an officer may arrest without a warrant, etc.

a warrant for the search of his home? It would not be reasonable or logical to believe that such is the intent of Congress.

There is, of course, no Federal statute treating of the validity of an arrest without a warrant when effected by the breaking of a door. Petitioner says that inasmuch as 18 U.S.C. 3109 prescribes conditions under which an officer may break a door to search with a warrant, the requirement of that statute that the officer must first give notice of his purpose before breaking a door should apply to officers seeking entry into a private home to arrest a suspected felon *without* a warrant. It is entirely unreasonable and illogical to suppose that the absence of a warrant permits greater latitude in making arrests under these circumstances than in instances of arrests *with* a warrant. However, even if this be not true, this Court in considering the problem of an arrest without a warrant in *United States* v. *Di Re*, 332 U.S. 581 at page 590; 92 L.Ed. 210 at page 218 said, "Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject". In the *Di Re* case, *supra* and in a subsequent case, *Johnson* v. *United States*, 333 U.S. 10, 92 L.Ed. 436 this Court held that in the absence of an applicable Federal statute, an arrest without a warrant for a Federal crime depends for its validity upon the law of the state wherein the arrest is made.

In the District of Columbia the law on the subject has been clearly set forth in *Accarino* v. *United States*, 85 U.S. App. D.C. 394; 179 F.2d 456: A door may not be broken to effect an arrest unless the officer makes known the cause of his demand for entry and that an arrest in violation of this rule is illegal. The arrest of petitioner Miller and the arrest of his co-defendant Byrd were, therefore, plainly illegal under the law in the District of Columbia.

In this case Officer Wurms not only broke the chain latch on the apartment door of petitioner without an announcement of purpose but, indeed, this was the *second* breaking, for Officer Wurms had gained access to the basement hallway by using a skeleton key to unlock a door leading from the first floor to the basement (R. 29). In *McDonald* v. *United States*, 335 U.S. 451, 458-460; 93 L.Ed. 153, 160 the concurring opinion of Mr. Justice Jackson is based upon the proposition that a search and seizure resulting from an unlawful breaking and entry is illegal and inadmissible for that reason alone:

> "But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. *Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality.*[6] Cf. Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, LRA 1915B 834, Ann. Cas. 1915C 1177; Taylor v. United States, 286 U.S. 1, 76 L.Ed. 951, 52 S.Ct. 466; Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367."

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[6] Emphasis supplied.

Here, of course, the position of petitioner Miller is infinitely stronger than that of McDonald because here, not only did the officer unlawfully break and enter a door leading to a public hallway, but after having broken into and entered the hallway, he broke the private door to petitioner's apartment without announcement of purpose. So far as Officer Wurms was concerned, it is obvious from his unlawful entry into the door leading to the basement, before he broke petitioner's door, that he had no intention of proceeding in a lawful manner

In *Accarino* v. *United States*, 85 U.S. App. D.C. 394; 179 F.2d 456 the United States Court of Appeals for the District of Columbia Circuit gathered all of the authorities, English and American, on the subject of the right of an officer to break down the door of a dwelling to effect an arrest without a warrant, and after making a painstaking, complete and careful analysis of all of the authorities, reached this conclusion:

> "It is of interest to us in the case at bar that there is no division of opinion among the learned authors we have been discussing upon the proposition that even where an officer may have power to break open a door without a warrant he cannot lawfully do so unless he first notifies the occupants as to the purpose of his demand for entry."
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> * * * * * * *
>
> "Upon one topic there appears to be no dispute in the authorities. Before an officer can break open a door to a home, he must make known the cause of his demand for entry. There is no claim in the case at bar that the officers advised the suspect of the cause of their demand before they broke down the door. Upon that clear ground alone, the breaking of the door was unlawful, the presence of the officers in the apartment

was unlawful, and so the arrest was unlawful. It follows that the search was unlawful and the evidence thus procured should have been suppressed." *Accarino* case, *supra.*

The United States Court of Appeals for the District of Columbia Circuit reaffirmed the doctrine of the *Accarino* case, *supra* in *Gatewood* v. *United States*, 93 U.S. App. D.C. 226; 209 F.2d 789, saying:

> "In Accarino v. United States, 1949, 85 U.S. App. D.C. 349, 179 F.2d 456, 465, we reviewed the authorities and found them unanimous in holding that before an officer can break open the door to a home, he must make known the cause of his demand for entry."

On December 31, 1956, that Court decided a case involving the breaking of a door to execute a search warrant without announcement of purpose by officers seeking entry, *Woods* v. *United States*, 99 U.S. App. D.C. 351; 240 F.2d 37. Concerning the admissibility of the evidence secured as a result of the execution of the warrant in this fashion, the Court said: "Having failed by their own admission to comply with the command of the statute, *we must hold the evidence was obtained as a result of the unlawful entry. . . .*" The Court cited *Palmer* v. *King*, 41 App. D.C. 419, 425-426:

> ". . . when an officer, in the execution of a writ, finds an outer door or window slightly ajar, but not sufficiently so to admit him, he may open the door or window, provided he does not find it obstructed, but if it is fastened or obstructed so as to require force to overcome the obstruction he may not use such force, for such an entrance would constitute a breaking."

See also: *McKnight* v. *United States*, 87 U.S. App. D.C. 151; 183 F.2d 977.

The United States Court of Appeals for the Ninth Circuit in *Alvau* v. *United States*, 33 F.2d 467 held that the breaking into of an occupied dwelling at nighttime to search for liquor was unlawful and evidence obtained inadmissible. The Court reasoned:

> "Forcibly and in the nighttime to enter an occupied residence, even though it is thought to be used in part for unlawful purposes, is likely to be attended with disorder, and to result in violence and tragic consequences. We feel constrained to hold that the search was unreasonable and in violation of constitutional rights, and that therefore the evidence was inadmissible."

In Kentucky it is provided by statute:

> "To make an arrest, an officer may break open the door of a house in which defendant may be, after having demanded admittance *AND EXPLAINED the purpose for which admittance is desired*".[7] Kentucky Criminal Code Section 40; *American Cent. Ins. Co.* v. *Stearns Lumber Co.*, 145 Ky. 255; 36 L.R.A. (N.S.) 566; 140 S.W. 148.

The Kentucky statute is nothing more than a statement of the common law. The common law regarding this matter is in force in the District of Columbia. *Accarino* v. *United States, supra.*

Since it is plain that in this case the officer and agent effected the arrest of petitioner through a manifest violation of the law, the question is whether or not such arrest was in violation of the rights secured to petitioner under Amendment IV of the Constitution. Because there is no

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[7] Emphasis supplied.

sanction in the law against the agents or officers making an arrest under such circumstances it would appear that the penalty must be assessed against the government. That penalty is that the arrest must be ruled illegal and its fruits excluded. Since the first expression of the Federal exclusionary rule against evidence obtained in violation of law in *Weeks* v. *United States*, 232 U.S. 383 many courts have dealt with its rationale, including the United States Court of Appeals for the District of Columbia, *Nueslein* v. *District of Columbia*, 73 App. D.C. 85; 115 F.2d 690 wherein the late Chief Justice Vinson, then an associate Justice of that Court, stated that officers should not be encouraged to proceed in an irregular manner on the chance that all will end well. To those who believe that this might handicap law enforcement officers, Justice Vinson had this to say:

> "The federal rule which we are applying to this case has been called an expression of misguided sentimentality, a rule more apropos for a fox hunt than for the catching of brutal criminals. It may be that the courts at times by giving force to the principles in the Bill of Rights have handed scheming, calculating, premeditating felons too many effective instruments in the legal battle before the penitentiary portals. The IVth Amendment, however, was not written for felons alone. It not only includes misdemeanants, but also the great bulk of the population, the innocent. Ordinarily, the individual is entitled to the privacy of his home. But when the individual through his actions becomes a suspect, the sanctity of his home is not quite so inviolable; the public interest in bringing criminals to trial cuts across that sanctity. But even then the Constitution requires an orderly procedure." *Nueslein* v. *District of Columbia*, 73 App. D.C. 85 at page 91; 115 F.2d 690 at page 696.

The California Supreme Court in *California* v. *Cahan*, 44 Cal. 2d 434; 50 ALR 2d 513; 282 P.2d 905, decided April 27, 1955, discarded the rule that evidence, no matter how illegally obtained, is admissible against a defendant in a criminal case and in that decision adopted the federal doctrine that evidence obtained in violation of law must be excluded. The opinion of Judge Traynor conceded that the exclusionary rule would not prevent all illegal searches and seizures but expressed the view that it would go far in discouraging them. Said Judge Traynor: "Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the concept of ordered liberty."

The action of the Agent and Officer in this case being plainly illegal, the evidence secured as a result of such illegal activity must be suppressed. It was error to admit into evidence the "marked money" seized by Agent Wilson and Officer Wurms.

II.

Petitioner's Arrest Was Incidental to the Purpose of Searching His Home at Night Without a Warrant for Evidence (Marked Money) and the Arrest Was a Mere Pretext for the Search.

This Court, in *United States* v. *Rabinowitz*, 339 U.S. 56; 94 L.Ed. 653 made clear the law that there is no requirement for a search warrant *solely* upon the basis of the practicability of procuring it rather than upon the *reasonableness* of the search after a lawful arrest. The Court held that search and seizure reasonable because: "(1) the search and seizure were incident to a valid arrest; (2) the place

of search was a business room to which the public, including the officers, was invited . . . (5) the possession of the forged and altered stamps was a crime . . ." Previously this Court in *Brinegar* v. *United States*, 338 U.S. 160; 93 L.Ed. 1879 in upholding the reasonableness of a search without a warrant stated: "No problem of searching the home or any other place of privacy was presented either in Carroll or here." 338 U.S. at page 176; 93 L.Ed. at page 1891. Earlier, this Court in *Johnson* v. *United States*, 333 U.S. 10, at page 14; 92 L.Ed. 436 said, "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." We learned from this Court in *Agnello* v. *United States*, 269 U.S. 20, 33; 70 L.Ed. 145; 51 A.L.R. 409:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The rationale of these decisions seems to be that there is a marked and decided difference between searches of homes and searches of public places or automobiles and that in instances of search without a warrant the privacy of a home is not lightly to be regarded. Petitioner says the breaking into his home during the nighttime without a warrant, without announcement of purpose and for the primary purpose of searching for evidence was oppressive, unreasonable and a violation of the rights secured to him under Amendment IV.

Agent Wilson had but one purpose in mind in the entry into petitioner's apartment. That purpose of course, was the search for and the seizure of his "marked money" (R.

134). This was not a case where the agent had an informer ready, willing and able to testify that he had purchased a narcotic drug from the suspect. Here the purchase had been made by the "proposed defendant Shepherd" and this was an inference only; there would never be a witness to the assumed transaction. In order to make out a case against petitioner for the sale to Shepherd it was of paramount importance to search for and to seize the "marked money" with which Shepherd made the purchase. After having forced and broken their way into petitioner's dwelling, Wilson told petitioner and Byrd, that they were looking for their marked money (R. 134). It is of significance also that Wilson put his ear to petitioner's door to hear if there were sounds of anyone moving around inside. Despite the fact that Wilson said he heard no signs of life inside, Wurms spoke "very quietly" and spoke in a "very low voice" when he knocked on the door to say "Blue, police, open the door." Wurms had reached the basement by unlocking a door with a skeleton key. It could be inferred from this conduct that the agent and officer did not intend that their call be heard and that they purposed to break down the door in any event. But even if such was not their intention, it cannot be said that they had any other *primary* purpose in entering the premises other than to search for the marked money. It is obvious, therefore, that the breaking and entry was for that principal purpose; the arrests of petitioner and Byrd were merely incidental to the search. A case very similar to the instant case in this respect, except that there was no breaking of a door and that the informers had made a purchase of narcotics from the suspect with marked money, had told agents that they had done so and had turned over the narcotics purchased to the agents, is *Henderson* v. *United States* (4th Cir.), 12 F.2d 528. In that case the Court said:

"There is no showing or contention that it was necessary to arrest defendant without a warrant to prevent his escape, and a careful consideration of the evidence leads irresistibly to the conclusion that the search of his dwelling was made, not as an incident of the arrest, but as the chief object which the officers had in view in entering upon his premises. Instead of the search being incidental to the arrest, therefore, the arrest was incidental to if not a mere pretext for the search. The question is whether a search made under such circumstances violates the constitutional rights of the defendant. We think it does."

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"On the other hand, there was a reason why the officers desired to make an immediate search of defendant's premises. They had given marked money to the informers with which to purchase cocaine, and an immediate search was expected to reveal the marked money in his possession. That this was the real object of the officers appears from the fact that immediately upon gaining admission to the premises they demanded the right to search, and only placed the defendant under physical restraint when he denied their right to search without warrant."

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"Can it be the law that an officer, for the purpose of seeking evidence, may invade the home of a citizen and search it, without the oath or affirmation required by the Constitution, and without having the question of probable cause determined by a judicial officer, upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a revenue act? Shall such determination by the officer of probable cause obviate all necessity for complying with the prerequisites to

> the right of search which the Constitution has so carefully prescribed as a safeguard to the privacy of the home? And when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises and that the arrest was a pretext for or at the most an incident of the search, ought such search be upheld as a reasonable one within the meaning of the Constitution? Manifestly not: To quote again the language of Mr. Justice Butler: 'The search of a private dwelling without a warrant, is, in itself, unreasonable and abhorrent to our laws.'"

In this regard the law was simply and succinctly stated by this Court in the concluding paragraph in *United States* v. *Lefkowitz*, 285 U.S. 452 at page 467; 76 L.Ed. 877 at page 884, "*An arrest may not be used as a pretext to search for evidence.*" See also: *McKnight* v. *United States*, 183 F.2d 977; 87 U.S. App. D.C. 151; *Worthington* v. *United States*, 166 F.2d 557. True enough, in this case as in the *Henderson* case, *supra* the "marked" money sought by the officers and agents was discovered upon the premises of the suspect. However, "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . ." *Byars* v. *United States*, 273 U.S. 28 at page 29; 71 L.Ed. 520 at page 522.

Because the entry into petitioner's home during the nighttime without a warrant for the primary purpose of searching for evidence was unreasonable, it was an unwarranted invasion of his right of privacy and security under Amendment IV, aside and apart from the illegal breaking of his door. The marked money seized in petitioner's apartment was, therefore, improperly admitted into evidence and petitioner's conviction should be reversed.

CONCLUSION

For the reasons aforesaid, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

De Long Harris
Attorney for Petitioner